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Be Careful What You Threaten

Rule 5-100(A) prohibits lawyers from using threats to exert leverage in settlement of a civil dispute

By JASON D. KOGAN

John believes he was defrauded by Bruce, his former business partner, and retains attorney Tom to file a lawsuit against Bruce. Bruce's conduct in defrauding John also constitutes a crime. Tom would like to get a quick settlement and save his client attorney's fees.

In thinking about what leverage he has to do this, Tom asks himself: Can he threaten to report Bruce to the district attorney's office if Bruce does not promptly settle John's claim?

The answer to Tom's question is found in Rule of Professional Conduct 5-100(A) which provides: "A member shall not threaten to present criminal, administrative, or disciplinary charges to obtain an advantage in a civil dispute." This rule is intended to prohibit an attorney from threatening to use the criminal, administrative or disciplinary process to exert leverage in settlement of a civil dispute.

Rule 5-100's sweep is very broad. A "civil dispute" is defined as "a controversy or potential controversy over the rights and duties of two or more parties under civil law." (Rule 5-100(C).) Included within the definition of a "civil dispute" is "an administrative proceeding of a quasi-civil nature pending before a federal, state, or local government entity." (Id.) The filing of a civil action is not a prerequisite to the applicability of rule 5-100. (Id.)

"Administrative charges" are also liberally defined and mean "the filing or lodging of a complaint with a federal, state, or local government entity which may order or recommend the loss or suspension of a license, or may impose or recommend the imposition of a fine, pecuniary sanction, or other sanction of a quasi-criminal nature." (Rule 5-100(B).)

There is one exception: a threat to file an administrative charge required by law as a condition precedent to filing a civil action based on the same occurrence or transaction is exempt from rule 5-100. (Id. See Discussion to rule 5-100; Cal. State Bar Formal Op. No. 1984-81.)

Rule 5-100 is not limited to threats made to a party to a civil dispute. A threat made to a witness in a civil dispute also may violate the rule. (Cf. *In re Madsen*, 370 N.E. 2d 199 (Ill.1977).)

Language constituting a prohibited threat

An attorney making a threat proscribed by rule 5-100 is subject to disciplinary action, including disbarment. In any proceeding to determine whether rule 5-100 has been violated, there is always one primary issue: Did the language used by the attorney constitute a threat prohibited by the rule?

The leading California case on this issue is *Crane v. State Farm of California*, 30 Cal.3d 117 (1981). In that case, decided under rule 7-104, the predecessor to rule 5-100 (rule 5-100(A) closely tracks rule 7-104), an attorney sent a letter to the opposing side stating that if certain information was not received within five days, suit would be instituted and "the Department of Savings and Loan and the Attorney General's Office will be requested to assist us in solution."(Id. at 121.)

A notation on the letter indicated that copies were being sent to a named deputy attorney general and a named commissioner of the Department of Savings and Loan. The California Supreme Court concluded that when the facts were viewed from the perspective of the recipient of the letter "and considered in context," including the notation that copies of the letter were sent to government agencies, the letter "could quite reasonably be construed as violative of rule 7-104." (Id. at 123.)

Crane has a message for California lawyers: a threat need not be explicit to be a violation of rule 5-100, but may be implied from the circumstances in which the offending statement is made.

"The import of Crane is that a threat to present charges need not be expressly stated in words of a threatening nature, but may be inferred from the circumstances; and, that the innocent subjective intent of the maker of the statement is not a relevant factor. If the statement can be reasonably interpreted as a threat to present criminal, administrative or disciplinary charges, in the context of a civil dispute, that is sufficient to constitute a violation of Rule 5-100(A)." (Los Angeles County Bar Ass'n Formal Op. No. 469 (1993). See Cal. State Bar Formal Op. No. 1989-106; Cal. State Bar

Formal Op. No. 1983-73.)

Following Crane, California ethics opinions have cautioned that even a communication by an attorney to the opposing side mentioning that he or his client will present a criminal, administrative or disciplinary charge against the opposing party or attorney can be interpreted as a threat under rule 5-100.

For example, if an attorney informs opposing counsel that his client intends to file an administrative complaint, "there is a definite risk that such a statement may be interpreted as an implied or veiled threat" prohibited by rule 5-100. (Cal. State Bar Formal Op. No. 1983-73.)

A statement by an attorney to opposing counsel that he has recommended his clients report the opposing counsel's conduct to the State Bar, or that he will have his clients report the opposing counsel to the State Bar, "can be reasonably taken as an impermissible threat under Rule 5-100."(Los Angeles County Bar Ass'n Formal Op. No. 469 (1993).)

Threats to invoke criminal process

Threats to invoke the criminal process to gain an advantage in a civil dispute have garnered the most attention in judicial and ethics opinions. Not surprisingly, fear of criminal prosecution engendered by a threat to make a criminal complaint may pressure a party to settle a civil dispute. Public policy strongly disfavors such manipulation of the criminal process.

"The civil adjudicative process is primarily designed for the settlement of disputes between parties, while the criminal process is designed for the protection of society as a whole. Threatening to use, or using, the criminal process to coerce adjustment of private civil claims or controversies is a subversion of that process; further, the person against whom the criminal process is so misused may be deterred from asserting his legal rights and thus the usefulness of the civil process in settling private disputes is impaired.

As in all cases of abuse of the judicial process, the improper use of criminal process tends to diminish public confidence in our legal system." (Cal. State Bar Formal Op. No. 1989-106 (citing ABA Ethical Consideration 7-21).)

Threats to invoke the criminal process to gain an advantage in a civil dispute which resulted in the imposition of discipline have included:

■ During wrongful discharge action against a public employer, plaintiff's attorney wrote letter stating that if there were no settlement, "'appropriate action' would be taken before the district attorney and other named public agencies to bring to the attention of voters alleged unethical and illegal conduct of the transient district's board." (*Matter of Rodriguez*, 2 Cal. State Bar Ct. Rptr. 480, 488 (1993).)

■ Attorney threatened to report his client's fiancé to the Attorney General if she pursued her claim for refund of fees she paid on behalf of client. (*Marquette v. State Bar of California*, 44 Cal. 3d 253 (1988).)

■ connection with a bankruptcy proceeding, attorney wrote letter stating that "Failure to comply with this demand will result in a request for criminal charges against you for embezzlement or such other offenses as may be appropriate." (*Standing Committee on Discipline of the United States District Court for the Southern District of California v. Ross*, 735 F.2d 1168, 1171 (9th Cir. 1984).)

■ Attorney stated he would drop criminal charge of assault against former client if client paid attorney's fees from prior representation. (*Bluestein v. State Bar of California*, 13 Cal. 3d 162 (1975).)

■ Attorney secretly recorded conversations with former client and told former client that recordings showed an attempt to extort money, but that tapes would be destroyed if former client ceased interfering with pending adoption. (*Arden v. State Bar of California*, 52 Cal. 2d 310 (1959).)

■ Attorney wrote letters stating that opposing party committed perjury during trial and if money not paid by certain date, new trial motion would be filed based on commission of perjury and client would file complaint with district attorney. (*Libarian v. State Bar*, 38 Cal. 2d 328 (1952).)

Prosecutors are not immune from rule 5-100. A prosecutor may not condition an offer to dismiss a criminal case upon a stipulation by the defendant that there was probable cause for the defendant's arrest because such practice "is tantamount to a threat to continue the action if the defendant will not give such a release" and thus "cannot be countenanced under rule 5-100." (Cal. State Bar Formal Op. No. 1989-106.)

Threats to pursue all available legal remedies

Before filing a lawsuit, it is not uncommon for the complaining party's counsel to send a demand letter to the adverse party threatening that unless there is a settlement satisfactory to the complaining party, he will pursue all available legal remedies. One ethics committee observed that such language is ambiguous and, therefore, is not a threat barred by rule 5-100.

"This language, alone, is not an overt threat to present criminal or administrative charges to obtain an advantage in the civil dispute. For example, the proposed statement could imply that absent a prompt settlement, the writer will

aggressively prosecute the civil matter to its conclusion.

Thus, to interpret the meaning of the letter as a threat in violation of rule 5-100 would have a chilling effect on the legitimate effort to promptly settle the civil dispute. This committee is unwilling to interpret ambiguous language made in attempts to settle civil disputes as violations of rule 5-100." (Cal. State Bar Formal Op. No. 1991-124.)

Threats by the client

Rule 5-100 applies only to lawyers, of course. It does not bar the client from approaching the opposing side and threatening to present a criminal, administrative or disciplinary charge — even if the intent in making the threat is to coerce a settlement. However, an attorney may violate Rule 5-100 by "assisting the client in doing indirectly what the client cannot do directly," i.e., advising the client to make a threat proscribed by Rule 5-100. (Cal. State Bar Formal Op. No. 1983-73.)

Criminal, administrative or disciplinary charges

An attorney may conclude that there is a legitimate basis for contacting the District Attorney to request that the opposing party be prosecuted or filing a complaint about the opposing counsel's conduct with the State Bar. Rule 5-100 is not violated simply by taking such action. It is only a threat covered by the rule that is prohibited.

Unfortunately, even in the absence of any threat, an attorney's presenting of a criminal, administrative or disciplinary charge during a civil dispute will not provide any solace to the person against whom the charge has been made. Merely making a charge could have the same effect that the rule was intended to prevent: coercing the settlement of a civil dispute.

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Test
1 Hour MCLE Credit

1. Rule of Professional Conduct 5-100(A) ("rule") prohibits an attorney from threatening to use the criminal process to exert leverage in settlement of a civil dispute.

2. An attorney making a threat proscribed by the rule is subject to disciplinary action.

3. The filing of a civil action is a prerequisite to the applicability of the rule.

4. The rule does not apply to a threat to file an administrative charge required by law as a condition precedent to filing a civil action based on the same occurrence or transaction.

5. A threat must be explicit to be a violation of the rule.

6. The innocent subjective intent of an attorney making a threat is a relevant factor in determining whether the rule has been violated.

7. Threatening to use the criminal process to coerce resolution of a private civil claim subverts the criminal process.

8. A prosecutor may not condition an offer to dismiss a criminal case upon a stipulation by the defendant that there was probable cause for the defendant's arrest.

9. It is not a violation of the rule for the complaining party's counsel to send a demand letter to the adverse party threatening that unless there is a settlement satisfactory to the complaining party, he will pursue all available legal remedies.

10. The rule covers clients as well as lawyers.

11. A threat by an attorney to file an administrative complaint with a local government entity which may order the suspension of a license is prohibited by the rule.

12. The rule bars an attorney from presenting a criminal, administrative or disciplinary charge to the appropriate authority.

13. It may be a violation of the rule for an attorney to inform the opposing counsel that an administrative complaint will be filed against the opposing party.

14. The rule is violated if an attorney sends a letter stating that the failure to comply with a demand in the letter will result in the attorney making a request that criminal charges be brought against the adverse party.

15. A statement by an attorney to opposing counsel that he has recommended his clients report the opposing counsel's conduct to the State Bar can be reasonably taken as an impermissible threat under the rule.

16. A threat made to a witness in a civil dispute may violate the rule.

17. An attorney may violate the rule by advising the client to make a threat prohibited by rule 5-100.

18. In determining whether there has been a violation of the rule, an attorney's statement should be considered in the circumstances in which it was made.

19. A client can approach the opposing party and threaten to present a criminal, administrative or disciplinary charge even if the intent in making the threat is to exert leverage to coerce a settlement.

20. The rule does not prohibit a threat to use the disciplinary process to exert leverage in settlement of a civil dispute.

Certification

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■ The State Bar of California certifies that this activity conforms to the standards for approved education activities prescribed by the rules and regulations of the State Bar of California governing minimum continuing legal education.

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